No. 2609

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR F. HUTTON, doing business as Hutton Machine Works, *Appellant,*

vs.

BRITISH COLUMBIA MARINE RAILWAY COMPANY, LIMITED, a corporation, claimant of the Steamship "Alaskan," Her Boilers, Engines, Machinery, Boats, Apparel and Furniture, *Appellee.*

Brief of Appellant

H. A. MARTIN, Proctor for Appellant.

Dearborn Printing Co., 303 Collins Blk.

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Appellant

STATEMENT OF CASE.

This is a libel filed by the libelant against the steamer "Alaskan" on account of repair work done

by the libelant on the "Alaskan" between August 24, 1909, and September 29, 1909, and in which the British Columbia Marine Railway Co., Ltd., a corporation, intervened as claimant. The evidence shows that it became necessary to have certain repair work done on the "Alaskan," then owned by the "Steamer Alaskan, Inc.," a corporation, of the State of Washington, and that at that time Mr. John P. Urbaneck was chief engineer of the boat; that Mr. Urbaneck made out the list of repairs necessary and gave it to Mr. H. C. Bradford, who was the agent for the boat and the owners at Seattle; that Mr. Bradford took this list to Mr. Hutton and ordered the repairs made; that the repairs were made by the libelant under the supervision of Mr. Urbaneck. The libelant made two invoices of the repair work, one dated September 16th, 1909, and the other dated September 30th, 1909, each of the invoices showing the work to be charged to the "Str. Alaskan," by the libelant, which invoices were approved by Mr. Urbaneck, (Libelant's Exhibit "A"), and then presented to Mr. Bradford. The amount of the invoices was $755.48, upon which $154.61 was paid. Libelant had done work for the same people at other times, always charging the work and rendering the bills against the *vessels* direct. (Apostles

p. 36.) The home port of the boat was Ketchikan, Alaska, (Apostles p. 33, Libelant's Exhibit "B") and we believe the evidence shows that she was the only asset of the corporation owning her. (Apostles p. 26.) The point relied upon by the Appellee is the claim that the credit of the boat was not relied on in the doing of the repair work. The Appellant claims a lien in admiralty and under the statute of the State of Washington, Sec. 1182 of Rem. & Bal. Code of Washington, which reads as follows:

Sec. 1182. All steamers, vessels and boats, their tackle, apparel and furniture, are liable

1. For service rendered on board at the request of, or under contract with, their respective owners, charterers, masters, agents or consignees.

2. For work done or material furnished in this state for their construction, repair or equipment at the request of their respective owners, charterers, masters, agents, consignees, contractors, sub-contractors, or other person or persons having charge in whole or in part of their construction, alteration, repair or equipment; and every contractor, builder or person having charge, either in whole or in part, of the construction, alteration, repair or equipment of any steamer, vessel or boat, shall be held to be the agent of the owner for the purposes of this chapter, and for supplies furnished in this state for their use, at the request of their respective owners, charterers, masters, agents or consignees, and any person having charge, either in whole or in part, of the purchasing of supplies for the use of any such steamer, vessel or boat, shall be held to be

the agent of the owner for the purposes of this chapter.

3. For their wharfage and anchorage within this state.

4. For non-performance or malperformance of any contract for the transportation of persons or property between places within this state, or to or from places within this state, made by their respective owners, masters, agents or consignees.

5. For injuries committed by them to persons or property within this state, or while transporting such persons or property to or from this state. Demands for these several causes constitute liens upon all steamers, vessels and boats, and their tackle, apparel and furniture, and have priority in the order of the subdivisions hereinbefore enumerated, and have preference over all other demands; but such liens continue in force only for a period of three years from the time the cause of action accrued.

ASSIGNMENT OF ERRORS.

I.

That the Court erred in holding that the evidence failed to prove that there was any agreement, understanding or consent on the part of the owner of the steamer "Alaskan" that the said steamer should be subject to a lien in favor of the libelant, on account of the labor performed and the material furnished, and on account of which the libel was filed herein.

II.

That the Court erred in holding that the evidence failed to prove that the libelant, in fact, relied upon the credit of the steamer "Alaskan" in performing the labor and furnishing the labor and material and upon account of which the said libel was filed herein.

III.

That the Court erred in holding as a matter of law that it was necessary to prove that there was an agreement, understanding or consent on the part of the owner of the steamer "Alaskan," that the labor performed, was performed, and the material furnished, was furnished, on the credit of the "Alaskan" in order to subject the vessel to a lien for the labor performed and material furnished.

IV.

That the Court erred in entering a decree in favor of the intervening claimant and the respondent, and in refusing to enter a decree in favor of the libelant.

ARGUMENT.

The only point raised by the Appellee was that the evidence did not show that there was such a reliance upon the credit of the vessel in doing the

work as would entitle the appellant to a lien. In the first place it will be seen that the repairs made were necessary to the operation of the vessel. (See Mr. Hutton's testimony, Apostles p. 36, and Mr. Urbaneck's testimony, Apostles p. 20.) When the repairs were made, they were charged to the vessel and invoices were made direct in the name of the vessel and not in the name of the owners. (Libelant's Exhibit "A".) This had been the appellant's custom theretofore in dealing with the owners of this vessel (Apostles p. 36), and Mr. Hutton testified that he made the repairs relying on the credit of the vessel and would not have made them on any other condition. (Apostles pp. 23 and 36.) His testimony on this point was as follows: (Apostles p. 23):

> Q. I will ask whose credit these repairs were made on, whether the credit of the boat or credit of the company? A. Credit of the vessel.
>
> Q. Would you have made these repairs on anything but the credit of the vessel? A. I would not.
>
> (Apostles p. 36.)
>
> Q. Had you done work for these people before? A. On several occasions.
>
> Q. How had you charged on other occasions? A. To the vessel direct.

Q. And the bills had always been rendered to Bradford, charged to the boat direct? A. Charged to the boat, rendered to the company's office.

Q. Would you have done the work that was done on this boat on anything except the credit of the vessel? A. Absolutely not.

If Mr. Bradford, the agent for the owners of the vessel and the representative of the vessel, had believed that the appellant did not rely upon the credit of the vessel in making the repairs, it would have been most natural for him to have so testified upon his examination, but he did nothing of the kind. He makes no denial that the work was, in fact, done on the credit of the vessel. He does not claim that he thought that Mr. Hutton was not relying on the credit of the vessel but only goes so far as to say that they had no agreement on that point. He testified as follows on this point (Apostles p. 25):

Q. Was there any agreement made concerning the payment for these repairs? A. There was none.

Q. Did Mr. Hutton, or you, either of you, say anything specifically upon what credit these repairs were to be made? A. No, we did not.

Q. I will ask you directly whether or not you told Mr. Hutton that these repairs were to be made on the credit of the vessel. A. I did

not. I didn't order these repairs made as far as the bill goes.

Q. Did you ever, at any time, Mr. Bradford, engage Mr. Hutton to make any repairs on the steamship "Alaskan" under an agreement that the credit of the vessel should be pledged for the payment of the bill? A. No, I did not.

Mr. Bradford further shows in his testimony that the vessel was the only asset that the corporation had when he testified as follows (Apostles pp. 26, 27):

Q. The Ketchikan was in existence about the same time as the Steamer Alaskan Company? A. No, because we finished carrying mails; we retained the Alaskan and sold the other business, and called it the Alaskan, Incorporated.

Q. What was the financial condition of the Steamer Alaskan Company during this year? A. I couldn't tell you that.

Q. It wasn't very good, was it? A. Well, it had the value of the boat.

Q. Outside of that, it had no financial resources whatever? A. I don't know; I was simply agent.

Q. You didn't know anything about its finances? A. No further than the boat.

Had there been any other assets of the company, there can be no doubt but that Mr. Bradford would promptly have so testified or the testimony would

have been forthcoming in order to rebut any presumption of the necessity for reliance upon the credit of the vessel in order to secure repairs.

Where the vessel upon which the repairs are made or to which the supplies are furnished is the only vessel owned by the owners then the credit is presumed to have been extended to the vessel and not to the owners.

McRea vs. Bowers Dredging Company, 86 Fed. 344.

In that case Judge Hanford held that the liens were good not only under the state statute but under the general maritime law, and said:

"All of the coal consumed by both vessels while engaged in the work was purchased of the intervener, C. J. Smith, as receiver of the Oregon Improvement Company. The evidence shows that the defendant is a corporation organized under the laws of the State of Illinois. Its president and general officers, except a general manager, were not inhabitants of this state, it had no general office in this state while the work referred to was being done. The coal was furnished upon the request of the general manager, and was delivered in scows, from which it was received on board the dredgers as required for use. The evidence shows the average daily consumption of each of the dredgers, and the number of hours each was in operation; and from this data a close estimate of the amount supplied

to each can be ascertained, and a fair apportionment made, so that the liens upon each vessel will not be for a greater amount than the price of the coal which she consumed. Five thousand dollars is claimed as a set-off for work done by the dredgers in front of a wharf owned by the Oregon Improvement Company in Seattle harbor. The receiver has allowed a credit of $4,000 for this work, and I find from the evidence that this amount is full compensation for the services of the dredgers under the contract which the defendant made with Receiver Smith. It is earnestly contended in opposition to the demand of this intervener that the evidence is insufficient to prove that there was necessity for purchasing supplies of coal upon the credit of the dredgers, and that without such necessity there can be no lien. The proof is ample to show that the supplies were ordered by the general manager of the corporation, that such supplies were necessary to enable the dredgers to do their work, and that the general manager did not have money to pay for or means to procure said supplies, otherwise than upon the credit of the dredgers. This evidence is sufficient to raise a conclusive presumption of necessity for using the credit of the vessels. *The Grapeshot,* 9 Wall. 129-145; *The Lulu,* 10 Wall. 192-204."

I cannot help but feel that Judge Neterer, in his decision in the lower Court, has held us to a stricter rule with respect to the proof of an agreement or understanding for reliance upon the credit of the vessel in making the repairs than has been estab-

lished by this Court. Even the case of *Alaska & Pacific Steamship Co. vs. "The Chamberlain,* 116 Fed. 600, relied upon by the appellee and the lower Court, holds that the reliance upon the credit of the vessel may be shown by circumstances of such a nature as to justify the inference.

In that case it was said:

"It is not necessary, it is true, that the common intent to bind the vessel be expressed in words or in the form of an agreement. It may be established by proof of circumstances from which the common intent may be deduced, but in all cases it is essential that the evidence shall show a purpose upon the part of the seller to sell upon the credit of the vessel, and upon the part of the purchaser to pledge the vessel. In short, there can be no lien unless it was in the contemplation of both parties to the transaction, evidenced, either by express words to that effect or by circumstances of such a nature as to justify the inference."

In that case the charge was made to the charterer and the seller knew that the boat was under charter, and all of the circumstances showed that the seller even did not rely on the credit of the vessel.

It would seem that the facts in this case would bring it clearly within the rule in *The Bainbridge,* 210 Fed. 620, in which case the intervener had furnished gas engines and fixtures, which were installed

in the boat, and also other material and labor. The lower Court found that there was no agreement under the terms of which the material and labor furnished and performed were to be furnished and performed on the faith and credit of the vessel and concluded that the case came within the rule of *Alaska & P. S. S. Co. vs. C. W. Chamberlain & Co.*, 116 Fed. 600, and dismissed the intervener's libel. This Court, in reversing the lower Court, said:

"In the case so referred to, and relied upon by the Court below, a lien was claimed for supplies furnished a vessel at her home port at the instance of the charterer. There was no evidence even tending to show that the supplies were furnished on the faith and credit of the vessel. The evidence, so far as it went, was to the contrary. The bills which were made out and presented for the supplies were made against the charterer, and the failure of the libelant to produce its books on the trial was taken as indicating that the supplies had not been charged against the vessel. In the present case the facts are materially different. The intervening libel is brought to enforce a lien for machinery and repairs which went into the vessel and enhanced her value. The only testimony on the subject of the understanding between the parties is that of the president of the appellant, who testified as follows:

" 'Q. State whether or not, in the furnishing of the material that you have testified, and the work performed on the vessel in placing the engine equip-

ment in the vessel, whether or not you depended upon the credit of the vessel for payment? A. Any time we furnish anything for any vessel, we always hold the vessel; that is, we bill to the vessel, and hold the vessel for the repairs. Q. Well, at the time you agreed to furnish the machinery and perform these services testified to, did you have any understanding of any kind with the Sound Motor Company as to holding the vessel for the payment of the amount in case it was not paid? A. No; I did not have any understanding to hold the vessel; it was not mentioned. I did not mention it; but it was understood that we were to hold the engine until the final payment was made, but there was nothing said about holding the vessel, as I remember.'

"We think that there is enough in this testimony and the circumstances to show that the work was done, and the material was furnished, upon the faith and credit of the vessel. There was an understanding that the appellant was to hold the engine until final payment was made. The engine, representing almost the entire outlay of the appellant, having gone into the vessel, there was no way by which the appellant could hold the engine, otherwise than by holding the vessel. The owner must have understood that the vessel was liable for the material and machinery so furnished, for at the time, while this work was being done, King & Winge, who were making other repairs, were told by the owners: 'The boat is good for the work.'

"The statute of Washington (Section 1182) makes all vessels, their tackle, apparel and furni-

ture, liable for work done or material furnished in that state for construction, repair, or equipment at the request of their owners, or persons having charge of their construction, alteration, repair, or equipment. In view of the terms of the lien law, and the fact that in the present case the appellant furnished valuable machinery, which became part and parcel of the vessel, slight evidence should be required to establish the fact that the work was done and the material furnished on the faith and credit of the vessel, especially where, as here, there is entire absence of evidence to indicate a contrary intention.' ''

See also the following cases:
F. A. Kilburn, 179 Fed. 107;
Robert Dollar, 115 Fed. 218;
The Del Norte, 90 Fed. 506;
The Iris, 100 Fed. 104;
The Vigilent, 151 Fed. 747;
Berwind-White Coal Mining Co. vs. Metropolitan Trust Co., 166 Fed. 782.

In the case of *The F. A. Kilburn,* 179 Fed. 107, one Frank was the owner of the steamer at the time the repairs were made and it was under charter to Crescent Wharf & Warehouse Company, and in that case the Court, setting forth the evidence upon which the claim for lien was based, said:

"The evidence shows that the Independent Steamship Company operated the F. A. Kilburn, as well as other ships, chartered as well as owned by the Crescent Wharf & Warehouse Company; that one Walton was the agent of the company at San

Francisco, one Mott at San Pedro, and C. F. Lehman was president and manager of both companies. John T. Flynn was the chief engineer of the steamer at the time it was chartered, and had been such during all the time of Frank's ownership, and for a considerable period before. He continued such chief engineer until subsequent to the transactions here in question. The principal part of the repairs and supplies for which this libel was brought grew out of the breaking of the winches of the ship. Flynn testified, among other things, as follows:

"'In this particular case the winches were broken down by being overloaded. The capacity of the winches was two tons apiece. They took a launch aboard that weighed nine tons, and they broke the winch down. It was within an hour of sailing time. Mr. Walton, the agent of the Independent Steamship Company, asked me if I could do anything with those winches. I said that it would take all night to get them ready. He said there would be a man come aboard at San Pedro to fix them, and on the arrival of the vessel in San Pedro Mr. Mills, the bookkeeper—on the arrival of the ship at San Pedro, Mr. Mills, the bookkeeper, and a machinist, came aboard, the man who does Mr. Lehman's work. He said it was impossible to do it at San Pedro. I told him that we could get the freight out with one winch. On the arrival in San Francisco, I immediately went to the office and told Mr. Walton what Mr. Mills and the machinist had said at San Pedro. He told us to have the work done as quick as we could, and, as we did not want to delay the vessel, I telephoned to Mr. Carroll (one

of libelant's employees), and he came down. He said that he would have to take the winch to the shop. The order was to get it done as quickly as possible. They worked night and day, and they had it ready in three days. The next trip they took the other off. When we went on that run, the vessel was making a four or five days schedule, and they cut it down——"

"The evidence contained in the record leaves no room for doubt that the appellee performed the work and furnished the supplies charged for, and we think that it sustains also the findings of the trial Court that the charges therefor were reasonable. The evidence is without conflict that the appellee did the work and furnished the supplies upon the credit of the vessel, as it had been doing upon the order of the same chief engineer during the then 3½ years which he had occupied the position, and during which the appellee had from time to time done about thirty jobs upon the vessel, some of which were performed during Frank's ownership and some previous to his acquiring the vessel—the charges therefor in the books of the appellee always being made against the vessel and the owner. *It is true that the evidence is also without conflict to the effect that Frank, whose home was in San Francisco, did not know of the repairs and supplies in question, and was never told of them by either the appellee or Flynn, and that the appellee never made any inquiry as to who the owner of the ship was.* It is undisputed, however, that during all of the time Flynn was chief engineer upon the vessel, whenever repairs thereon were needed, he ordered them made by ap-

pellee, which the appellee did upon the credit of the vessel, always charging the same to the vessel and the owner, all of which charges previous to those here in question were paid, and that not only did the owner, Frank, in executing the charter above referred to, reserve the right to retain Flynn as the chief engineer, but Lehman's testimony is to the effect that Frank wanted Flynn so employed 'to keep the vessel in good condition,' and Frank himself testified:

" 'When I chartered the steamer to the Crescent Wharf & Warehouse Company, I went down to the steamer, and told Mr. Flynn I had chartered it to the Crescent Wharf & Warehouse Company, *and that under the charter they were to make all repairs,* and keep the steamer in the same condition she was in on the day I turned her over, and that he was to see that they did that. If he needed anything, he was to go to them, and see he got whatever she needed, and, if they did not do the work, to let me know. The same instructions were given to the captain.' "

The evidence in that case is NOT as strong as the evidence in favor of Hutton for the evidence shows only that the repairs were necessary, that the libelant had made other repairs, charged the same to both the vessel and the owner, as they were charged the time for which the lien was claimed. The evidence shows further that the man who ordered the repairs made had positive orders to see that

all repairs made on the vessel were made at the expense of the charterers, so that when he ordered the repair work he could not have understood that it was to be done on the credit of the vessel.

The appellant feels that his showing that the repairs that he made were necessary to the operation of the boat; that he charged them to the vessel and not to the owner as they were made; that the vessel was the only asset of the owner; that although the vessel was owned by a Washington corporation it was not registered in Washington but in Alaska, and that its home port was Ketchikan, Alaska; that the libelant had done other work for the owners of the vessel before this work and had charged to the vessel and rendered the bills to the owners in that way; that he would not have done the work except upon the credit of the vessel, is a sufficient showing of circumstances to justify the inference that the work was, in fact, done upon the credit of the "Alaskan."

As in the case of "The Bainbridge" there is an entire absence of evidence to indicate an intention not to rely on the credit of the vessel. As in that case the appellant has made valuable improvements upon the vessel, and the vessel and the owner have

received the benefit of the improvement and should pay the bill. In "The Bainbridge" the Court said: "SLIGHT EVIDENCE SHOULD BE REQUIRED TO ESTABLISH THE FACT THAT THE WORK WAS DONE AND THE MATERIAL FURNISHED ON THE FAITH AND CREDIT OF THE VESSEL, ESPECIALLY WHERE, AS HERE, THERE IS AN ENTIRE ABSENCE OF EVIDENCE TO INDICATE A CONTRARY INTENTION."

The appellant feels that the evidence in that case was no stronger than in this case and that in this case the lower Court should be reversed and a decree entered in his favor for the full amount of his claim and interest and costs.

Respectfully submitted,

H. A. MARTIN,

Proctor for Appellant.